MUHAMMAD ALI RAHMAT v. AMGENERAL INSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[CIVIL APPEAL NO: WA-12BNCVC-190-12-2016]
5 JUNE 2017

CIVIL PROCEDURE: *Service – Notice of appeal – Appeal against decision of Sessions Court – Service of notice of appeal not endorsed by Registry of court – Whether service accepted without any protest – Whether service irregular and deemed as non-service – Whether ruling and legal principles in MBf Cards Services Sdn Bhd v Chew Ah Too good law and applicable – Whether appeal competent – Rules of Court 2012, O. 62 r. 6(3) & O. 55 rr. 3(4) & 5(2)*

CIVIL PROCEDURE: *Judgments and orders – Declaratory order – Road accident – Suits against insurer commenced at Sessions Court ('first court') – Insurer sought declaratory order from Sessions Court ('second court') on issue of liability while trial at first court was on-going – Second court declared insurer not liable after first court declared insurer liable – Whether decision after trial – Whether declaratory orders may legally be made*

EVIDENCE: *Fresh or further evidence – On appeal – Appeal against decision of Sessions Court – Appellant sought to adduce grounds of judgment of Sessions Court – Whether grounds of judgment relevant and material to appeal – Whether ought to be tendered as part of record during hearing of appeal*

ROAD TRAFFIC: *Accident – Insurance – Road accident involving car, motorcycle and lorry – Liability of insurer under policy – Road Transport Act 1987, ss. 96(1) & (3)*

Two suits were initiated at the Seremban Sessions Court ('the SSC') concerning a motor vehicle accident which involved (i) a lorry insured by the respondent ('the plaintiff') and driven by one Suresh ('the first defendant'); (ii) the motorcycle rode by the appellant ('the sixth defendant'); and (iii) a car ('the running down suits'). While the trial of running down suits was on-going, the plaintiff filed originating summons ('OS38') at the Kuala Lumpur Sessions Court ('KLSC') for declarations pursuant to s. 96(1) and (3) of the Road Transport Act 1987 ('the Act'). One of the issues for the determination in the SSC was, *inter alia,* whether the first defendant was the authorised driver of the insured lorry and the SSC held that he was and this meant that the plaintiff was liable. The SSC's decision was delivered on 7 October 2016. However, in its decision delivered on 30 November 2016, the KLSC allowed OS38 which resulted in the plaintiff avoiding liability under the motor vehicle insurance policy. In the present appeal against the decision of the KLSC, three applications arose, namely (i) the sixth defendant's applications (a) to adduce the material grounds of judgment in the running down suits as fresh evidence ('encl. 7'); and (b) for extension of time

to file the memorandum of appeal ('encl. 9'); and (ii) the plaintiff's application to strike out the appeal ('encl. 17') as it was submitted that, even though the notice of appeal was properly filed in court within time, the sixth defendant did not serve the copy sealed and endorsed by the Registry of Court to the plaintiff within time. Instead, the sixth defendant served the plaintiff with an unsealed duplicate of the notice of appeal. In support of its argument that the endorsed copy of the notice of appeal must be served, the plaintiff referred to *MBf Cards Services Sdn Bhd v. Chew Ah Too* ('the *MBf* case') which held that an appeal from a subordinate court is not brought until the notice of appeal and the endorsed notice is duly served.

Held (dismissing encl. 17; ordering encls. 7 and 9 in terms):

(1) Enclosure 17 was filed as an afterthought. The appeal record, which included the endorsed copy of the notice of appeal, was filed on 9 January 2017. It could not be said that the plaintiff had absolutely no idea of the sixth defendant's appeal as a copy of the notice of appeal was sent *via* facsimile on 13 December 2016. The plaintiff did not raise any objection or send a notice to the sixth defendant reserving their rights with regard to the non-service of the sealed notice of appeal or service *via* facsimile only. It was only when encl. 17 was filed on 11 April 2017 that an objection was raised by the plaintiff for the first time and there was no explanation for the delay. Such a passive response invited the inference that the plaintiff condoned or waived the irregularity. (paras 16, 18, 19 & 20)

(2) Under O. 55 r. 2 of the ROC, the time frame provided to serve the duplicate of a notice of appeal is 14 days from the date of the decision appealed against. On the mode of service by facsimile, O. 62 r. 6(3) of the ROC provides that the service by facsimile is to be followed by service by any of the methods of service under O. 62 r. 6(1) of the ROC within three days; failing which the service by facsimile is deemed as non-service. The sixth defendant's notice of appeal was filed within time and a copy of the notice of appeal was sent *via* facsimile within the time limit for filing and serving of the same. The mistake that occurred was that the notice of appeal was sent *via* ordinary post and the sixth defendant did not adduce any proof that the notice of appeal was duly served on the plaintiff. However, there was no irregularity of a fundamental nature in this appeal which could not be cured. (paras 28, 30, 32 & 33)

(3) The adjectival jurisprudence that emanated from the *MBf* case and other cases before and after the *MBf* case which adopted the legal principle that the endorsed notice of appeal must be served was no longer applicable. Order 55 rr. 3(4) and 5(2) were amended in 2012 to overcome the ruling

in the *MBf* case and the drafters of the ROC deliberately used the words 'duplicate copy' which obviated the need for serving the endorsed copy. There was no merit in encl. 17 and it was therefore dismissed. (paras 35 & 36)

(4) There was some confusion as to whether the decision in OS38 could be regarded as a decision after trial. It was not a decision after full trial as it was based on affidavits/submissions but the sixth defendant should not be punished because of the lack of clarity that existed in the ROC. It was only fair and proper that time be extended and encl. 9 was allowed. (para 37)

(5) The grounds of judgment which the sixth defendant wished to adduce were both relevant and material and could have led to a different outcome if the judge who heard OS38 was apprised of the finding that was made in the running down suits. The grounds of judgment could not have been brought forward earlier as they only came into existence after the decision was given on 7 October 2016. The sixth defendant's application met all the criteria stipulated in O. 55 r. 7 of the ROC. It was only fair, just and appropriate that the grounds of judgment in the running down suits be tendered as part of the record during the hearing of this appeal. (paras 40 & 41)

Case(s) referred to:
Dato' Valumalai V Muthusamy v. Dato' Dr Tan Chin Woh [2010] 5 CLJ 758 CA ***(refd)***
Mat Sannusi Mohamad & Anor v. Jeevaratnam Thevaraj [2016] 1 LNS 1025 HC ***(refd)***
MBf Cards Services Sdn Bhd v. Chew Ah Too [2009] 1 CLJ 140 CA ***(refd)***
MS Cooling Sdn Bhd v. Gerimis Baiduri Sdn Bhd [2015] 1 LNS 217 HC ***(refd)***
Sandanadass Lawrance v. Teoh Ah Hwa [2002] 8 CLJ 951 HC ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 96(1), (3)

For the respondent/plaintiff - Raymond Sivasothay; M/s VP Nathan & Partners
For the appellant/6th defendant - Khairun Nisya Khudri; M/s Aimi, Zainuritha & Co

[Editor's note: Appeal from Sessions Court; Originating Summons No: WA-B54-38-07-2016]

Reported by Najib Tamby

JUDGMENT

S Nantha Balan J:

The Application

[1] These are my grounds in respect of the following applications by the respondent ('plaintiff') and the appellant (the sixth defendant "D6"):

(a) Enclosure 7 - D6's application to adduce fresh evidence to adduce the grounds of judgment in a related running down matter;

(b) Enclosure 9 - D6's application for extension time to file the memorandum of appeal; and

(c) Enclosure 17 - plaintiff's application to strike out the appeal - by reason of D6's failure to serve the sealed notice of appeal within the time period as stipulated in the Rules of Court 2012 ("ROC").

[2] For convenience, I shall refer to the parties by their original title in the court below. Hence, the appellant shall be referred to as "D6". The respondent as the "plaintiff". The second defendant shall be referred to as "D2/the insured". The first defendant as "D1". The third, fourth and sixth defendants as "D3", "D4" and "D5" respectively. The appeal record shall be referred to as "AR".

[3] In encl. 17, which was filed on 11 April 2017, the plaintiff applied to strike out the appeal as the endorsed copy of notice of appeal was not properly served on the plaintiffs solicitors within the time period for filing and service of the notice of appeal.

[4] D6 has applied by way of encl. 9 for extension of time to file the memorandum of appeal. D6 has also applied by way of encl. 7 for leave to adduce fresh evidence, to wit, the grounds of judgment in the running down action(s) in the Seremban Sessions Court.

The Appeal

[5] The appeal by D6 is against the decision of the Kuala Lumpur Sessions Court on 30 November 2016 allowing the plaintiffs application by way of an Originating Summons WA-B54-38-07-2016 ("OS38") for declarations in relation to s. 96(1) and 96(3) of the Road Transport Act 1987 and thereby avoiding liability under the particular motor vehicle policy of insurance.

[6] Section 96(1) and 96(3) of the Road Transport Act 1987 read as follows:

> 96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 9l(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> ...

(3) No sum shall be payable by an insurer under subsection(1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[7] The orders that were granted in OS38 read as follows:

(a) Masa untuk memfailkan dan menyerahkan saman pemula ini dilanjutkan (jika perlu);

(b) Bahawa polisi insurans bernombor JVB8259576 (selepas ini dirujuk sebagai "polisi tersebut") yang melindungi motorlori No.WSP 4484 dari 14/05/2014 hingga 13/05/2015 adalah tidak boleh dikuatkuasakan ("unenforceable"), termasuk tetapi tidak terhad kepada kemalangan yang didakwa berlaku pada 29/06/2014 di antara m/lori No. WSP 4484, m/kar No. WRA 9200 dan m/sikal No. WBB 9627 di KM 9, Jalan Lukut, Sepang.

(c) Bahawa Plaintif sekarang dan pada semua masa matan berhak untuk mengelak tanggungan ('avoid liability') dibawah polisi tersebut dan justeru itu, menjadikan Plaintif dan penghakiman di bawah Seksyen 96 Akta Pengangkutan Jalanraya 1987 berdasarkan tindakan Mahkamah Sesyen Seremban Guaman No. A53KJ-388-08/2015 dan No.A53KJ-49-01/2016 dan/atau mana-mana tindakan lain yang akan dan/atau telah difailkan berikutan kemalangan jalanraya tersebut.

(d) Relif-relif perintah-perintah dan/atau arahan lanjutan lain yang dianggap sesuai dan manfaat oleh Mahkamah yang Mulia ini;

(e) Kos;

(p. 15, AR)

Background Facts

[8] The background facts are as follows. D6 is the plaintiff in a running down action, namely, Seremban Sessions Court Suit No. A53KJ-49-01-2016 ("suit 49"). He was the rider of motorcycle no. WBB 9627. There is another related running down action, namely suit A53KJ-388-08-2015 ("suit 388"). 0S38 is the spin-off from suit 49 and suit 388. Suit 49 and suit 388 shall collectively be referred as the "running down suits". The plaintiffs in suit 388 are the driver and passengers of motor car WRA 9200 (named as D3, D4, D5 in 0S38). The subject matter of the running down suits is a motor

vehicle accident which occurred on 29 June 2014 involving motor lorry no. WSP 4484 (which was insured by the present plaintiff – AmGeneral Insurance Berhad) ("the insured motor-lorry"), motorcycle no. WBB 9627 (wherein D6 was the rider) and motorcar no. WRA 9200 (wherein D3 was the driver and D4 and D5, the passengers thereof).

[9] The owner of the insured motor lorry was Atlas Edible Ice Sdn Bhd (D2/the insured). The driver of the insured motor-lorry at the time of the accident was Suresh a/l Rajandram (D1). However, the plaintiff maintains that D1 was not an "authorised driver" of the insured motor lorry and therefore they as insurers of the insured motor-lorry, are not at risk for purposes of s. 96(1) of the Road Transport Act 1987.

Filing of 0S38

[10] Whilst the trial of the running down suits in the Seremban Sessions Court was on-going, the plaintiff filed 0S38 for declarations pursuant to s. 96(3) of the Road Transport Act 1987. 0S38 was filed in July 2016 whereas suit 49 was filed in January 2016. Suit 388 was filed in August 2015. The decision of the Seremban Sessions Court in the running down suits was delivered on 7 October 2016, whereas the decision in OS38 was delivered by the Sessions Court at Kuala Lumpur on 30 November 2016.

Decision In Running Down Suits

[11] On 7 October 2016, in the running down suits the Seremban Sessions Court decided that the insured motor lorry was liable for the accident.

[12] It is common ground that one of the issues for determination in the running down suits was *inter alia*, whether D1 was the authorised driver of the insured motor-lorry. In this regard, the Seremban Sessions Court unequivocally ruled that D1 was the authorised driver of the insured motor lorry at the time of the accident on 29 June 2014. D1 did not testify in the trial of running down suits. After a full trial and based on the evidence that was adduced, the Seremban Sessions Court found that D1 was the authorised driver of the insured motor-lorry at the material time.

[13] At this juncture, it is appropriate to pose the question: whether declaratory orders may legally be made in 0S38 to declare the relevant policy of insurance for the insured motor-lorry as null and void pursuant to s. 96(3) Road Transport Act 1987 after the Seremban Sessions Court in the running down suits, had determined liability against the insured motor lorry and held that D1 was the authorised driver. This issue patently touches on the merits of the present appeal before me. I mention this only to emphasise that the appeal by D6 has merits and it shall be dealt with appropriately in the appeal proper on a later date.

[14] I shall now proceed to consider the three applications, namely encl. 7, encl. 9 and encl. 17.

Enclosure 17

[15] I will start with encl. 17. The issue that was raised by the plaintiff is that D6 did not serve on the plaintiff the duly endorsed notice of appeal dated 13 December 2016 and that the document which was "served" if at all, was a duplicate of the notice of appeal which was sent *via* facsimile on 13 December 2016. It is of course not in dispute that the notice of appeal dated 13 December 2016 was properly filed by way of e-filing within time. The duplicate copy of the "unsealed" notice of appeal dated 13 December 2016 was then sent to the plaintiff's solicitors *via* facsimile on 13 December 2016. On the same day the duplicate copy of the notice of appeal was "posted" to the plaintiff's solicitors, but there is no proof that the copy that was sent by post was duly delivered on the plaintiff's solicitors.

[16] However, the AR did contain a copy of the sealed notice of appeal. The issue that was raised by way of encl. 17 was that the document that was served, was only sent by facsimile on 13 December 2016 and thereafter the original document was not served on the plaintiff's solicitors within three days thereafter as stipulated in O. 62 r. 6(3)(d) ROC. The AR was filed subsequently on 9 January 2017 and served on the plaintiff's solicitors *via* courier. The endorsed copy of the notice of appeal was included in the AR (p. 1-3 AR).

[17] This takes us to the next complaint – that the notice of appeal which was "endorsed" by the Registry of the court was not served on the plaintiff's solicitors. However, there is no dispute that the copy that was sent by facsimile on 13 December 2016 is the same document that is found in the AR (1-3 AR) except that the copy in the AR is the duly endorsed copy. It is material to note that the notice of appeal was properly filed in the Registry of the Sessions Court together with a covering letter dated 13 December 2016 from Messrs Aimi Zainuritha & Co. acting on behalf of D6. The letter was duly copied to the plaintiff's solicitors and reads as follows:

PENDAFTAR
Mahkamah Sesyen Kuala Lumpur
Kompleks Mahkamah Kuala Lumpur
Jalan Duta
50592 Kuala Lumpur
Malaysia
Tuan,

PER : RAYUAN KEPUTUSAN MAHKAMAH SESYEN KUALA LUMPUR KE MAHKAMAH TINGGI KUALA LUMPUR

GUAMAN SIVIL NO: WA-B54-38-07 TAHUN 2016

Merujuk kepada perkara diatas.

2. Bersama-sama ini disertakan dokumen-dokumen berikut untuk proses pemfailan:

a. Satu salinan Notis Rayuan;

b. Bayaran sebanyak RM1,000.00 sebagai sekuriti rayuan;

c. Bayaran sebanyak RM200.00 sebagai bayaran pemfailan Notis Rayuan; dan

d. Bayaran sebanyak RM50.00 sebagai fii pemfailan.

Sekian,

Terima Kasih.

t.t.

s/k:

1. MESSRS V.P. NATHAN & PARTNERS
Peguamara Plaintif
Unit 3, 1st 2nd 3rd & 4th Floor
PJ 21 Commercial Centre
Jalan SS 3/39
47300 Petaling Jaya
Selangor Darul Ehsan
[Ruj: VPN/CM/ANC/nages/66716(1)(B)-AMG]

2. MESSRS CHAND, JAG & ASSOCIATES
Peguambela Defendan ke-3, 4, 5 & 6
No. 44-1, Jalan BPM 2
Taman Bukit Piatu Mutiara
75150 Melaka
[Ruj: CJA/ACC/M/407/14]

3. MESSRS KARTHIG SHAN Peguambela Defendan Pertama No. 309-A-1, Taman AST Jalan Sungai Ujong
70200 Seremban
Negeri Sembilan
[Ruj: KS/A/139/16]

[18] As I said, the AR contained the duly endorsed notice of appeal (pp. 1-3, AR). The AR was served around 9 January 2017. The plaintiffs solicitors did not at any time raise any objection or send a notice to D6's solicitors reserving their rights with regard to the non-service of sealed notice of appeal or service *via* facsimile only. It was only when encl. 17 was filed on 11 April 2017 that an objection was raised by the plaintiff's solicitors for the very first time. There is no explanation for the delay on the part of the plaintiff or their passiveness prior to filing encl. 17.

[19] It bears repeating that the notice of appeal dated 13 December 2016 was filed within time but there was non-compliance with regard to the service of it within time in the sense that a copy of the notice of appeal was not properly served at the office of the plaintiff's solicitors. But there was no objection when the notice of appeal was served as part of the AR on 9 January 2017. To my mind, the plaintiff's conduct in taking up the objection with regard to service of the notice of appeal suggests that encl. 17 was filed as an afterthought. All along the plaintiff kept silent and such a passive response or attitude is inevitably bound to invite the inference that they had condoned or waived the irregularity with regard to service of the notice of appeal out of time.

[20] At any rate, it cannot be said that the plaintiff had absolutely no notice of D6's appeal as a copy of the notice of appeal was sent *via* facsimile on 13 December 2016. Further, the covering letter to the court was also copied to the plaintiff's solicitors. Finally, when the AR was served on 9 January 2017, it contained the endorsed copy of the notice of appeal. It should also be borne in mind that according to the solicitors for D6, they had "posted" the notice of appeal on 13 December 2016. I shall come to this in the later part of the judgment.

[21] I turn now to the plaintiff's insistence that the "endorsed copy" of the notice of appeal must be served. In this regard, it must be borne in mind that O. 55 r. 3(4) and r. 5(2) ROC, only requires a duplicate copy of the notice of appeal to be served on the other parties to the appeal. Order 55 r. 3(4) and r. 5(2) ROC read as follows:

> Order 55 rule 3(4)
>
> (4) A duplicate copy of the notice of appeal must be served by the appellant within the time limited for the filing of an appeal on all respondents.
>
> Order 55 rule 5(2)
>
> (2) The appeal under this rule shall be brought by filing a notice of appeal in Form 111A in the Registry of the relevant Subordinate Court, with a copy extended to the Registry of the High Court within fourteen days from the date on which the decision was pronounced and serving a duplicate copy of the notice on every other party to the proceedings.

[22] In this regard it is perhaps necessary to refer to the commentary in the Malaysian Rules of Court 2012 – Annotation (LexisNexis) which states that:

> Order 55 r. 5(2) expressly states that a 'duplicate copy' of the notice of appeal may be served. In this regard, earlier cases such as *Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd* [2002] 1 MLJ 577 and *MBf Cards Services Sdn Bhd v. Chew Ah Too* [2009] 1 MLJ 684, CA, where it has been held that failure to serve an endorsed copy will not be considered service of a good notice of appeal are no longer good law. In so far as the requirement to name all proper parties and serve the notice of appeal on all parties who may be affected by the appeal,

[23] According to counsel for the plaintiff, the term "duplicate copy" of the notice of appeal under O. 55 r. 3(4) ROC means the duplicate copy of the endorsed notice of appeal. He referred to the following cases:

(a) *MS Cooling Sdn Bhd v. Gerimis Baiduri Sdn Bhd* [2015] 1 LNS 217; [2015] MLJU 2047 HC where it was held that:

> Even though the Appellant had served the unsealed copy of the NOA on 3.10.2014, i.e. within the required 14 days from the date of the decision appealed from, the Appellant did not comply with the requirement in the first limb of O. 55 r. 3(4) of the ROC, namely to serve a duplicate copy of the NOA to the Appellant. The words "must be served" makes it imperative for a duplicate copy of the filed and sealed copy of the NOA to be served on the Respondent.

(b) *Mat Sannusi Mohamad & Anor v. Jeevaratnam Thevaraj* [2016] 1 LNS 1025; [2016] MLJU 805 HC where the High Court followed *MBf Cards Services Sdn Bhd v. Chew Ah Too* [2009] 1 CLJ 140; [2009] 1 MLJ 684 CA and held that:

> [11] The question for this Court to determine was whether the wordings 'duplicate copy' could mean an unendorsed notice of appeal. This Court answered the question in the negative.
>
> [20] The failure to serve the endorsed copy of the notice of appeal within time is a serious procedural defect which could render the whole appeal invalid. Non-compliance of the appeal procedural rules is a defect which is not curable because it is a fundamental non-compliance with the basic process of bringing about an appeal.

[24] It was submitted for the plaintiff that the failure to comply with the mandatory requirements is fatal and that this appeal ought to be dismissed based on this.

[25] Counsel referred to *MBf Cards Services Sdn Bhd v. Chew Ah Too & Chew Hoe Kee* [2009] 1 CLJ 140; [2009] 1 MIJ 684 CA ("the *MBf* case") where it was held that an appeal from the subordinate court is not "brought" until the notice of appeal is filed, and the endorsed notice is duly served. Counsel said that the failure to serve the endorsed copy of the notice of appeal within time is fatal and is not curable. He referred to the decision of the Court of Appeal in *Dato' Valumalai V Muthusamy v. Dato' Dr Tan Chin Woh* [2010] 5 CLJ 758*;* [2010] MLJU 410 where the court held:

> As stated earlier, an appeal is not brought to this court until the notice of appeal is both filed and served, the one act without the other renders the appeal incompetent. Therefore, the failure to serve the notice of appeal on the other party within time is not an irregularity that can be cured.

[26] The first point that must be made in this context is that in the present case, the plaintiff was clearly not caught by surprise at all. They had notice of the fact that D6 had lodged an appeal against the decision of the Sessions Court and this notice is to be gleaned from the duplicate notice of appeal which was sent by facsimile to the plaintiff's solicitors on 13 December 2016 and followed by a copy of the covering letter dated 13 December 2016 that was sent to the Registry of the Sessions Court.

[27] Eventually the AR was filed and was sent to the plaintiff's solicitors *via* courier on 9 January 2017. The sealed copy of the notice of appeal was part of the AR.

[28] Thus, the plaintiff's solicitors had due notice of the appeal, *via* facsimile on 13 December 2016 and were later given a copy of the sealed notice of appeal when the AR was served on them. The question is whether the appeal should be struck out solely by reason of the failure to serve the duplicate on the plaintiff's solicitors within the time frame as provided under O. 55 r. 2 ROC, that is, within fourteen days from the date of the decision appealed against. On the mode of service by facsimile, it is clear that pursuant to O. 62 r. 6(3) ROC, service by facsimile is to be followed by service, within three days, by any of the methods of service under r. 6(1) of O. 62 of the ROC, failing which the service by facsimile is deemed as "non-service".

[29] As I have stated, on or about 9 January 2017, the AR was served and the sealed copy of the notice of appeal was part of the AR. Again, I should mention that at no time did the plaintiff raise any objection. They passively accepted service *via* facsimile and later received the AR without protest.

[30] Of course, this is not to say that the plaintiffs solicitors are under a duty to protest, but their conduct in remaining silent can in certain circumstances, such as the present one, give rise to adverse consequences. It also bears repeating that notice of appeal was filed within time and a copy of the notice of appeal was sent *via* facsimile within the time limited for filing and serving the notice of appeal.

[31] The mistake that occurred was that the notice of appeal was sent *via* ordinary post and the solicitors for D6 have no proof that the notice of appeal was duly served on the plaintiffs solicitors. But it is significant that in an affidavit affirmed on 18 May 2017 (encl. 20), D6 averred in para. 10 thereof that the notice of appeal was "posted" on 13 December 2016. The solicitor, Cik Khairun Nisya binti Khudri also affirmed an affidavit on 18 May 2017 (encl. 21) and stated in para. 10 of her affidavit that the notice of appeal was "posted" on 13 December 2016.

[32] The present case bears some shade of similarity with the case of *Sandanadass Lawrance v. Teoh Ah Hwa* [2002] 8 CLJ 951; [2002] 4 MLJ 214 HC. The discussion by the High Court in that case at p. 218 to p. 221 is both relevant and instructive. In that case, the court rejected the objection that was taken with regard to service of the notice of appeal:

Defective notice of appeal

In her submission before the court, counsel for the respondent indicated that **the first notice of appeal served on the appellant is defective in that it does not indicate the date on which the same was filed. The said notice merely contained the date of the notice of appeal which was 3 March 2001**. The notice of appeal on p 1 of the appeal record (encl. 6) which in her submission is the second notice of appeal shows the date of the notice of appeal and the date of filing of the same is indicated as 5 March 2001. However, this second notice was only served on the appellant on 29 March 2001 which is well outside the permitted time under O. 49 r. 2(6) of the Rules which provides:

> The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

The time for filing a notice of appeal as provided in O. 49 r. 2(3) of the Rules is 14 days from the date on which the decision was pronounced.

A notice of appeal serves as a notice to the respondent that an appeal is pending and in the instant case by the service of the first notice of appeal, the respondent is fully informed and made aware of that fact.

The respondent is therefore not caught unaware or by surprise and I do not see in what manner he is prejudiced. As a matter of fact, the respondent was subsequently served with another notice although out of time.

It follows therefore *that only if the irregularity is so fundamental and so serious to the extent that the other party is prejudiced by such irregularity that this court will not invoke its power under the said rule. On the facts and circumstances of the appeal before me, I hold that the irregularity in the instant appeal is not so serious as to have caused prejudice to the respondent and for that reason, I hold that the respondent's objection on this ground fails. In light of the above, the respondent's objection on the ground that no application for extension of time was made to file the second notice of appeal outside the permissible period by the appellant also fails*.

[33] In my view, there is in the present appeal before me, no irregularity of a fundamental nature here which cannot be cured. The solicitors for D6 have said on oath that the notice of appeal was posted and I have no reason to disbelieve them when they said so in their affidavit.

[34] In situations such as the present case, apart from the facts/circumstances and conduct of the parties, the court must also have regard, not just to technical compliance with the ROC, but also to the merits and justice of the case in deciding whether to exercise its discretion to either excuse the non-compliance or to punish the non-compliant party and strike out the appeal without it being heard on merits. These circumstances would include the overall conduct of the parties and the merits of the appeal, if any.

In so far as the merits are concerned, it can hardly be said that there are no merits because there is first, a finding in the running down suits that D1 was the authorised driver and secondly, the issue as to whether a declaration to declare the motor vehicle policy of insurance as null and void can be granted pursuant to s. 96(3) of the Road Transport Act 1987, "after" judgment had been entered in the running down suits. A B

[35] In so far as the plaintiff's insistence on service of the duly "endorsed" notice of appeal, the view I take is that the adjectival jurisprudence that emanated from the *MBf* case and other cases (pre and post the *MBf* case) which adopted the same legal principle, that the "endorsed" notice of appeal must be served, are no longer applicable as O. 55 r. 3(4) and r. 5(2) ROC were amended in 2012 to overcome the ruling in the *MBf* case and the drafters of the ROC deliberately used the words "duplicate copy" and thereby obviating the need for serving the endorsed copy. C

[36] In the circumstances, I am of the view that in the present circumstances and based on the justice of the case, there is no merit in encl. 17 and it should therefore be dismissed. D

[37] I turn now to the application by D6 (encl. 9) for extension of time to file the memorandum of appeal out of time. On this point, I agree that there is some confusion as to whether a decision in OS38 can be regarded as a decision "after trial". It is possible to argue that the decision in OS38 does not fall under "decision after trial". In fact, it is not a decision after full trial as it was based on affidavits/submissions. In the meanwhile, D6 should not be punished because of the lack of clarity that exists in the ROC. Hence, it is only fair and proper that time be extended and encl. 9 is therefore allowed. E F

[38] The last matter that I have to deal with is D6's application (encl. 7) for leave to adduce further evidence, namely the grounds of judgment in the running down suits. In this regard, the issue of Dl's authority to drive the insured motor-lorry goes to the very heart of 0S38. The finding by the Seremban Sessions Court that D1 was an authorised driver was a finding made after a full trial and after hearing the relevant witnesses. G

[39] Of course, D1 did not testify during the trial. But the Sessions Court Judge opined that the burden was on D2, as the owner of the insured motor-lorry to call D1 and a Nepalese worker who was at the factory at the material time to testify on the issue of D1's authority to drive the insured motor-lorry. Both persons were not called as witnesses to testify in the trial of the running down suits. H

[40] The learned Sessions Court Judge gave his reasons for arriving at the conclusion that D1 was an authorized driver at the material time. I will not venture further into this topic at this stage other than to say that the grounds of judgment are both relevant and material and could have led to a different I

A outcome if the Sessions Court Judge who heard 0S38 was apprised of the finding that was made in the running down suits. At any rate, the grounds of judgment could not have been brought forward earlier as they only came into existence after the decision was given on 7 October 2016.

B **[41]** In my view, D6's application meets all the criteria as stipulated in O. 55 r. 7 ROC. As such, it is only fair, just and appropriate that the grounds of judgment in the running down suits be tendered as part of the record during the hearing of the present appeal. Counsel for the plaintiff said that if the grounds of judgment in the running down suits are to be adduced as fresh evidence, then for completeness, the notes of evidence should also be C adduced. Counsel for D6 offered no resistance.

[42] Hence, I ordered that leave be granted for the grounds of judgment and the notes of evidence in the running down suits to be adduced as fresh evidence by way of a supplementary AR, which will also include the memorandum of appeal.

D

The Outcome

[43] The orders are as follows:

(a) Enclosure 17 is dismissed. I made no order as to costs as D6 should not be rewarded with costs as they did not properly comply with the ROC;

E

(b) Enclosure 9 – Order in terms. Memorandum of appeal to be filed by way of supplementary AR to be filed by 19 June 2017. No order as to costs; and

(c) Enclosure 7 – D6's application for leave to adduce fresh evidence – F grounds of judgment in suit 49. Order in terms. D6 to file supplementary AR containing the grounds of judgment and notes of evidence in the running down suits within two weeks from today (by 19 June 2017). No order as to costs.

G Order accordingly.

H

I